

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

| | | |
|--|---|----------------------------|
| UNITED STATES OF AMERICA, | * | |
| | * | |
| Plaintiff, | * | |
| | * | |
| v. | * | CASE NO. 2:06-CV-00116-MEF |
| | * | |
| FIVE HUNDRED FORTY-THREE | * | |
| THOUSAND ONE HUNDRED NINETY | * | |
| DOLLARS (\$543,190.00 in United States | * | |
| Currency | * | |
| Defendant. | * | |
| and | * | |
| | * | |
| ENRIQUE ALCARAZ-BARAJAS, | * | |
| | * | |
| Claimant. | * | |

MOTION TO STRIKE FROM CONSIDERATION
ON GOVERNMENT'S SECOND MOTION FOR SUMMARY JUDGMENT

Comes now the Claimant Enrique Alcaraz-Barajas, by and through counsel and moves the Court to strike certain portions of the documents and other record materials relied upon by the Plaintiff in its Motion for Summary Judgment as follows:

1. All references to statements and events prior to, during and immediately after the stop and search of Claimant's luggage, as well as all statements and events up to the post-arrest interview of Claimant are rank hearsay. The Verified Complaint for Forfeiture in Rem is verified by Agent Joe Herman, who was not present during the stop, search, on-site interrogation, seizure and transport. Such hearsay includes, but is not limited to, the allegations of Paragraph number 5, subparagraphs a, b, and c. It should be noted that the verification says, "that the matters contained in the Verified Complaint are true to my knowledge, *except that those matters herein stated to be alleged on information and belief and on those matters I believe them to be true.*" (emphasis supplied). It should be further

noted that there is, in the Verified Complaint, no distinction between matters in his personal knowledge and those that are not. Additionally, the alleged statements by Esther Sandoval and Mario Martinez are, as to Claimant, rank hearsay in and of themselves without regard to whether Agent Herman actually heard them, they being offered for proof of the matters asserted. Herman is, thus, not competent to testify to such matters and the verification fails to meet the standards for reliance in summary judgment. "Supporting and opposing affidavits shall be made **on personal knowledge**, shall set forth such facts **as would be admissible in evidence**, and shall show affirmatively that **the affiant is competent to testify to the matters stated therein.**" (emphasis supplied). **Rule 56 (e), F.R.C.P.**

2. All statements of any kind and nature by Claimant because they were the product of an illegal stop, detention, arrest, seizure, questioning and search of Claimant and his personal property, subject to suppression and disallowance pursuant to Claimant's rights under the Fourth Amendment to the Constitution of the United States of America. Claimant's Motion to Suppress, which was previously filed, is incorporated herein by reference. The Fourth Amendment Exclusionary Rule applies to civil forfeiture. See **U.S. v. Premises and Real Property with Bldgs., Appurtenances and Improvements at 500 Delaware Street**, 113 F.3d 310, 312 n.3 (2nd Cir. 1997).

3. The alleged alert by a drug dog as to both the trunk of the vehicle and the luggage of Claimant in that, as presented, these matters constitute inadmissible hearsay.

4. All matters which occurred after the stop of the vehicle in which Claimant was riding in that all are in violation of the Fourth Amendment, as alleged in Claimant's Motion to Suppress previously filed.

WHEREFORE, the defendant moves this Court to strike said matters and remove them from consideration on the government's Second Motion for Summary Judgment.

s/Bruce Maddox
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to appropriate parties.

s/Bruce Maddox
Of Counsel